IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO.474 OF 2002
IN
SUMMARY SUIT NO.707 OF 2001

National Bank of Fujairah P.S.C. Plaintiff

versus

Goverdhandas V.Awtaney and another Defendants

Ms.Farzana Behramkamdin i/by M/s.FZB and Associates for plaintiff.

Mr.P.G.Sabnis for defendants.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 20th July 2005

PC :

1. Heard Ms.Behramkamdin appearing for plaintiff and Mr.Sabnis for defendants.

2. The summary suit is filed by the plaintiffs invoking summary jurisdiction of this Court under Order XXXVII of Code of Civil Procedure to recover from the defendants, who are guarantors, a sum of AED 8,604,470.32.

3. It is the case of the plaintiff that they are a banking company incorporated under the laws of

United Arab Emirates (UAE for short) having branch office inter alia at Dubai. The first and the second defendants are share holders and directors of a company called Anil Trading Company LLC.. This company was incorporated under the laws of Dubai, UAE.. This company is the principal borrower to whom diverse facilities have been extended as set out in the plaint. It is not necessary to make reference to the averments in the plaint pertaining to the facilities inasmuch as it is not the case of Mr.Sabnis that such facilities were not given or that documents executed in consideration thereof, have not been so executed. What is material for the purposes of the present suit is plaintiffs assertion that the defendants have guaranteed repayment of the dues under these facilities. The deeds of guarantee are executed by the defendants and copies thereof have been annexed to the plaint. First such guarantee is at Exhibit E-2, page 36. Ms.Behramkamdin invites my attention to the clauses of the guarantee which states that it is a continuing security and that the liability of the defendants arises the moment a demand is made and without any demur or protest the defendants would make repayment of the amounts demanded by the plaintiffs. She submits

that there is no dispute that the documents/deeds are guarantee deeds. Neither there is any scope to question the demand nor the exclusiveness thereof. The terms of the guarantee are absolute. She submits that since the amounts under these facilities are not repaid, a demand notice was addressed on 22nd February 2001 by the plaintiff through their advocates. The demand was raised on defendants 1 and 2 herein at their residential address namely Flat No.702, 'A' Wing, Pearl Apartments Co-operative Housing Society, third Cross Road, Lokhandwala Complex, Andheri (West), Mumbai. After setting out the facts pertaining to the facilities and also liability of the principal borrower, the plaintiffs raised a demand on the defendants herein after pointing out that the security in terms of the insurance policy issued by the Morgan Life Insurance Company is not available. In other words, the guarantee was invoked and although the same demand letter was received, there being no response, ultimately, present summary suit is filed and a summons for judgement is taken out claiming decree against the defendants in a sum of AED 8,604,470.32.

4. An affidavit in reply is filed by the

defendants on 1st July 2003. The first contention raised therein is pertaining to the jurisdiction of this Court. Elaborating that defence, Mr.Sabnis contends that the suit is filed against the defendants on the basis that the defendants are residing and/or carrying on business in Mumbai. He invites my attention to para 2 and para 27 of the plaint wherein it is contended by the plaintiffs that defendants are Indian Passport holders presently residing at Mumbai. They have been in UAE but have fled the said country and now residing in Mumbai. Thus, according to Mr.Sabnis, the plaint proceeds on the basis that as on the date of institution of suit, the defendants were residing and/or carrying on business in Mumbai. He submits that the defendants have not been residing at Mumbai. They are Non Resident Indians. They are neither residing nor working for gain in Mumbai. This was the position when the suit was filed. The only connection the defendants have with Mumbai is that they own property namely a flat and this is not sufficient to confer jurisdiction on this Court to entertain and try the w present suit. Mr.Sabnis submits that the entire cause of action has arisen in UAE. The facilities are extended by the plaintiffs who are a banking company

incorporated in UAE from their branch in Dubai. The company which is the principal borrower, is carrying on business in UAE.. At the relevant time defendants were also in UAE.. However, it is note worthy that the defendants are now based in Moscow in Russia. The deponent of affidavit namely defendant no.1 has given his address as a permanent resident of Russia. He submits that defendants have not absconded from Dubai. They are legitimately permitted to leave the said country and they have NRI status. In any event, they have business outside India. Their permanent address is at Bhopal in Madhya Pradesh. In this view of the matter, merely on the basis of the averments in the plaint, this Court would not get jurisdiction to entertain and try the suit. Moreso, when a false and misleading claim is made in the plaint. In support of these submissions Mr.Sabnis relies upon following decisions :-

1. AIR-1971-Madras-363 (M.S.M.Buhari Vs. S.M.Buhari)

2. AIR-1959-Rajasthan-166 (Mannalal and others Vs. Paneychand and others)

3. AIR-1962-Rajasthan-88 (Jaichand Lal Vs. Firm Kesrichand Bhanwarlal and others)

4. AIR-1918-Bom-290 (Goswami Shri 108 Shri Girdharji Maharaj Vs. Shah Govardhanlalji

Girdhariji Maharaj)

5. The next contention of Mr.Sabnis is that assuming without admitting that this Court has territorial jurisdiction to entertain and try present suit, when the entire cause of action has arisen at Dubai and plaintiffs are at Dubai, then it would be more convenient if the plaintiffs file a suit against defendants in Dubai. In the present case, admittedly there is an agreement conferring jurisdiction to the Courts at Dubai or in any event in UAE.. When such an agreement is reached w and when both plaintiffs and defendants herein are parties to the same, then this Court ought not proceed with the present suit and direct the parties to abide by their agreement. This is the additional reason according to him by which this Court has no jurisdiction to try the present suit.

6. The third contention of Mr.Sabnis is that on affidavit it has been pointed out by the defendants that several amounts have been received by the plaintiffs from the drawers of the bills. The drawers are residents of UAE.. He submits that if the suit is tried by the Court in UAE, it will be possible to lead evidence of

the drawers to prove said facts. He also contends that according to the information received by the defendants, plaintiffs have settled the claim with the drawers and amounts have been paid by the drawers to the plaintiffs, and these facts have been suppressed in order to mislead this Court. For all these reasons, triable issues arise and unconditional leave be granted to the defendants to defend the suit.

7. Since on affidavit a plea was raised that after institution of the suit plaintiffs have received diverse amounts, an affidavit-in-rejoinder is tendered by plaintiffs affirmed on 12th July 2005. In para 7 of the affidavit, the plaintiffs have stated that they have received from the drawers, by post dated cheques, a sum of AED 3,771,063.30. In view thereof, the suit claim is as set out in the plaint. It is submitted that these facts are not suppressed and in para 18 of the plaint they have been elaborately set out.

8. All contentions of Mr.Sabnis are pertaining to territorial jurisdiction of this Court. Ms.Behramkamdin submits that the suit has rightly been filed in this Court. She submits that it is

not denied by the defendants that they own immovable property in Mumbai. It is further clear that the defendants reside in the flat whenever in Mumbai and on regular basis. She submits that the issue of jurisdiction is raised because this Court in a Notice of Motion taken out in the present suit had protected the plaintiffs by granting an injunction restraining the defendants from disposing off or alienating this flat. The defendants have absconded from Dubai. Mumbai flat and Bhopal house are their only assets. She submits that the defendants are admittedly Indian citizens. They are holding Indian Passport and it is evident that when the suit was instituted, they were residing in Mumbai. She submits that clause XII of the Letters Patent of this Court supersedes Section 20 as also 16 and 17 of CPC, 1908 and as far as territorial jurisdiction of this Court is concerned, requirement under clause XII is "dwelling" of the defendant. Admittedly, immovable property/flat in Mumbai amounts to dwelling of defendants in Mumbai and this would cloth this Court with territorial jurisdiction. She submits that all authorities relied upon by Mr.Sabnis are either in the context of Section 20 and in them on facts it was pointed that the

residence was casual and not regular. She also points out that insofar as jurisdiction of Dubai/UAE Courts is concerned, the clause in that behalf does not confer exclusive jurisdiction on them. Once the clause does not take away jurisdiction of a competent Court in India, then even otherwise this suit could have been filed in this Court.

9. In my view, the defendants do not dispute execution of the guarantee nor the terms thereof. If the affidavit-in-reply is read in it's entirety then they are not even disputing their liability. It is not as if the defendants are raising an issue with regard to the terms of the guarantee or that they raise pleas on interpretation of the same. That the document in question is a guarantee is also not disputed. Therefore, it is not as if the institution of this suit as a summary suit itself is challenged. However, the contention is that summary jurisdiction having been invoked and now that the issue of jurisdiction has been raised on affidavit, several questions may arise for this Court's consideration. It is on this plea that unconditional leave is sought from this Court by the defendants. This is not an issue of

jurisdiction in the context of the subject matter of the suit. The issue is not even about pecuniary limits of this Court. The issue is purely of territorial jurisdiction of this Court. In that behalf, all I have to see is whether in terms of clause XII of the Letters Patent this Court has jurisdiction or not. Clause XII of the Letters Patent which has been analyzed by this Court in a decision reported in 1980-Mh.L.J.-192, clearly states that if the defendant at the time of commencement of the suit shall dwell or carry on business or personally work for gain within this Court's territorial limits, then this Court has jurisdiction and there is no question of seeking leave under said provision. As to when leave would be necessary under that clause is also discussed in this judgement. The law is summarized thus. In a suit which is not for land, where the defendant resides or carries on business or works for gain in Mumbai, leave of the Court under clause XII is not a pre-condition to exercise of jurisdiction by the High Court. In other words, the word "dwelling" is taken as equivalent to "residence". Even otherwise, Law Lexicon, 1997 Edition by P.Ramanatha Aiyar defines word "dwelling" to mean "to inhabit, to reside, to remain, to be domiciled, to live in a

place, to have a habitation, to have a fixed place of residence, to abide as a permanent resident or to inhabit for a time, to live in a place, to have a habitation for some time or permanent." A privy council judgement reported in 13-BLR-520 has also been referred to by the learned author while defining the term "dwelling". The concept of dwelling or residence in the context of jurisdiction of a Court is also discussed in a decision of Supreme Court in AIR-1982-SC-3.

10. It is not necessary for me to finally decide this issue inasmuch as jurisdiction of the Court is decided on the averments in the plaint. If the defendants wants to challenge the same and they have raised pleas in that behalf then all that they can seek is an opportunity to substantiate them. On the pleas as raised on affidavit and supported by some documents, I cannot hold straight way that this Court has no jurisdiction to entertain and try the suit. It is not as if there is absolutely no connection of the defendants with the immovable property that is a flat in Mumbai. Whether this is their permanent place of residence or whether they reside casually or intermittently is something

which cannot be gone into at this stage. This is only a plausible case. It need not be gone into and adjudicated upon finally. Suffice it to state that even when a plausible defence is raised, this Court can appropriately consider the application for leave to defend. Therefore, conditions can be placed on the defendants while giving them opportunity to make good their case on this issue. Whether the clause in the alleged agreement confers exclusive jurisdiction on the Courts in UAE need not also be decided. All that is contended is when parties are in UAE and when they have conferred jurisdiction on the Courts in UAE, it would be convenient to proceed with the matter there. The witnesses and evidence are there. In my view, whether this aspect touches jurisdiction of this Court and whether this Court's jurisdiction could be ousted by presence of such a clause is also something which the defendant will have to establish. The third contention about drawers of the bills having paid monies and plaintiffs suppressing this fact, is not surviving any longer in the light of the affidavit filed in rejoinder and more particularly statements made therein (see para 7).

11. In my view, therefore, interest of justice would be served if, conditional leave is granted to the defendant to defend the suit on their depositing in this Court a sum of Rs.5.00 crores (Rs.Five crores only) within a period of 16 weeks. If the deposit is made, the suit shall stand transferred to the list of commercial causes with usual directions to file written statement, discovery and inspection.

12. Needless to state that if the amounts are not deposited, further consequences in law would follow. On the deposit being made, it would be open for the plaintiffs to apply for withdrawal and such application would be considered on it’s own merits and in accordance with law.

13. It is clarified that the observations made are for the purposes of disposal of this Summons for Judgement and shall not influence this Court at the trial. I have not discussed each and every judgement cited before me in detail because some of them deal with Section 20 of Code of Civil Procedure.

(S.C.DHARMADHIKARI, J.)